Supreme Court, U.S.
FILED
NOV 12 1999
OFFICE OF THE CLERK

(3)

No. 99-161

In the

Supreme Court of the United States

October Term, 1999

Chad Weisgram, et al.

Petitioner,

vs.

Marley Company, et al.,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITIONER'S BRIEF ON THE MERITS

Paul A. Strandness
Counsel of Record
Stephen S. Eckman
ECKMAN, STRANDNESS & EGAN
200 East Lake Street
Wayzata, MN 55391
(612) 594-3600

Daniel J. Dunn
MARING WILLIAMS LAW OFFICE
1220 Main Avenue, Suite 105
P.O. Box 2103
Fargo, ND 58107-2103
(701) 237-5297

Attorneys for Petitioner

1999 – Bachman Legal Printing ■ (612) 339-9518 ■ FAX (612) 337-8053

3881

QUESTION PRESENTED FOR REVIEW

Did the Eighth Circuit panel majority err when, after deciding to exclude certain expert testimony, it reviewed the record to see what valid evidence remained, and then ordered judgment entered for respondent, instead of considering whether petitioner should be allowed another opportunity to prove his claim or at least allow the district court that had heard the trial to make the new trial determination?

INTERESTED PARTIES

Petitioner/Appellee Chad Weisgram, individually and on behalf of the heirs of Bonnie Jo Weisgram, decedent.

Petitioner/Appellee State Farm Fire and Casualty Insurance Company. After certiorari was granted, State Farm obtained a voluntary dismissal from the appeal. Thus, State Farm is no longer a party to the action.

Respondents/Appellants Marley Company, a Delaware corporation and its subsidiary, Marley Electric Heating Company, a Delaware corporation; and United Dominion Industries, Inc., a Delaware corporation.

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW i

INTERESTED PARTIES ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

BASIS FOR JURISDICTION 1

RULES AND CONSTITUTIONAL PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2
- A. THE CAUSE OF THE FIRE 4
- B. THE DEFECTS IN THE WEISGRAM HEATER 11
- C. CARELESS CIGARETTE THEORY. 14

PROCEDURAL HISTORY 15

SUMMARY OF ARGUMENT 17

ARGUMENT 19

I. WHEN AN APPELLATE COURT EXCISES EXPERT TESTIMONY AS ERRONEOUSLY ADMITTED, THE DECISION WHETHER TO PERMIT THE PARTY WHO PREVAILED BELOW A NEW TRIAL SHOULD BE COMMITTED TO THE DISCRETION OF THE DISTRICT COURT. 19

II. THE EIGHTH CIRCUIT PANEL MAJORITY'S DECISION TO GRANT JUDGMENT AS A MATTER OF LAW TO RESPONDENT MARLEY COMPANY, ONLY AFTER EXCISING PORTIONS OF PETITIONER'S EXPERT TESTIMONY, WAS IMPROPER. 23

A. THE RULE IN THE EIGHTH CIRCUIT CLEARLY IS: IF THE DISTRICT COURT ERRED IN ADMITTING THE TESTIMONY OF THE PETITIONER'S EXPERTS, THE RELIEF TO BE AWARDED IS A NEW TRIAL, NOT JAML..... 23

B. OTHER CIRCUITS HAVE FOLLOWED THE REASONING OF *MIDCONTINENT* AND HELD THAT A COURT MAY NOT, AFTER A TRIAL IS OVER, FIRST EXCLUDE EVIDENCE AND TESTIMONY AND THEN GRANT A MOTION FOR JAML..... 25

III. FUNDAMENTAL NOTIONS OF FAIRNESS REQUIRE THAT PETITIONER BE AT LEAST GIVEN AN OPPORTUNITY TO ARGUE THAT A NEW TRIAL IS WARRANTED. 28

CONCLUSION 30

APPENDIX A-1

TABLE OF AUTHORITIES

CASES

Byrd v. Blue Ridge Rural Elec. Coop., Inc.
356 U.S. 525 (1958)..... 21

Dixon v. International Harvester Co.
754 F.2d 573 (5th Cir. 1985)..... 27

Douglass v. Eaton Corp.
956 F.2d 1339 (6th Cir. 1992)..... 27

Elbert v. Howmedica, Inc.
143 F.3d 1208 (9th Cir. 1998)..... 26, 27

Gasperini v. Center for Humanities, Inc.
518 U.S. 415 (1996)..... 17, 19, 20, 21

Herman v. Gen. Irrigation Co.
247 N.W.2d 472 (N.D. 1976)..... 3, 28

Iacurci v. Lummus Company
387 U.S. 86 (1967)..... 22

Jackson v. Pleasant Grove Health Care Center
980 F.2d 692 (11th Cir. 1993)..... 25, 27

Midcontinent Broadcasting Co., v. North Central Airlines Inc., 471 F.2d 357 (8th Cir.1973)..... 16, 23, 24, 26, 27

Montgomery Ward & Co. v. Duncan
311 U.S. 243 (1940)..... 24

Neely v. Martin K. Eby Construction Co.
386 U.S. 317 (1967)..... 22, 29

Schmidt v. Plains Elec., Inc.
281 N.W.2d 794 (N.D. 1979)..... 3, 28

Schudel v. General Elec. Co. 120 F.3d 991 (9th Cir. 1997),
cert. denied, 118 S. Ct. 1560 (1998)..... 26, 27

Smelser v. Norfolk Southern Railway Co.
105 F.3d 299 (6th Cir. 1997)..... 27

Sumitomo Bank of California v. Product Promotions, Inc.
717 F.2d 218 (5th Cir. 1983)..... 27

United States v. Generes, et Vir.
405 U.S. 93 (1972)..... 20

Weade v. Dichmann, Wright & Pugh, Inc.
337 U.S. 801 (1949)..... 22

Weisgram v. Marley Company
169 F.3d 514 (8th Cir. 1999)..... 1

CONSTITUTION, STATUTES & RULES

28 U.S.C. § 1254 1

28 U.S.C. § 1291 17

28 U.S.C. § 1332 ..... 2, 17

Rule 50 of the Federal Rules of Civil Procedure.....1, 22, 23,
..... 26, 27, A-1

Rule 59(a)(1) of the Federal Rules of Civil Procedure..... 1,
..... 17, 20

Rule 702 of the Federal Rules of Evidence..... 27

U.S. CONST., amend VII. 2, 17, 21, 22

OPINIONS BELOW

The opinion of the Eighth Circuit Court of Appeals is reported at 169 F.3d 514 (8th Cir. 1999) and reproduced in the *Appendix of Joint Petition for Writ of Certiorari* at A-1. The Court of Appeals (voting two to one) vacated a judgment in favor of the plaintiffs/petitioners and remanded for entry of judgment, as a matter of law, in favor of defendants/ respondents on February 23, 1999. The Petition for Rehearing and Rehearing en Banc was denied on April 26, 1999. Joint App., p. 169. The unreported Order of the District Court dated September 4, 1997, in which it denied respondents' Motion for Judgment as a Matter of Law, or Alternatively, for a New Trial, is reproduced in the Joint Appendix. Joint App., p. 127.

BASIS FOR JURISDICTION

The Judgment of the Court of Appeals was entered on February 23, 1999. The Petition for Rehearing and Petition for Rehearing En Banc were denied on April 26, 1999. The Petition for Certiorari was filed on July 22, 1999 and was granted on September 28, 1999. Chapter 28 U.S.C. § 1254 confers on this Court jurisdiction to review the judgment in question.

RULES AND CONSTITUTIONAL PROVISIONS INVOLVED

The rules involved in this case are: Rule 59(a)(1) of the Federal Rules of Civil Procedure which states: "(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States"; and, Rule 50 of the Federal

Rules of Civil Procedure which is reproduced in the Appendix to this brief.

The Seventh Amendment to the United States Constitution which states: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

STATEMENT OF THE CASE

INTRODUCTION.

This case arose out of a tragic fire before dawn on December 30, 1993, at the home of Bonnie Weisgram in Fargo, North Dakota, which resulted in her death. At the outset of this litigation, three separate claims were asserted against respondents: the wrongful death claim on behalf of Bonnie Weisgram; the property damage claim to her property asserted by State Farm Fire & Casualty Insurance Company; and the claim for damage to the adjoining property which was also paid by State Farm via an assignment.[1] The cases were filed in federal court pursuant to 28 U.S.C.§ 1332. The cases were consolidated for trial on February 12, 1996. Joint App., p. 64.

In the Complaint, petitioner alleged a heater manufactured by United Dominion Industries, Inc., a Delaware corporation through its wholly-owned subsidiary, the Marley Company, a Delaware corporation (respondents) was defective under North Dakota law and caused the fire in the Weisgram home. Most significant for this petition, the law of North Dakota allows a plaintiff to prove a product

[1] After certiorari was granted, State Farm obtained a dismissal from the appeal. Thus, State Farm is no longer a party to the action. Hence, this brief will use the term petitioner throughout to refer to plaintiffs collectively.

defect by circumstantial evidence. *See, Herman v. Gen. Irrigation Co.*, 247 N.W.2d 472 (N.D. 1976); *Schmidt v. Plains Elec., Inc.*, 281 N.W.2d 794 (N.D. 1979). In addition, because several key components in the Weisgram heater were destroyed in the fire, it was impossible to recreate the events on the night of December 30, 1993, using the actual heater. Thus, the circumstantial evidence presented at trial played a significant role in the proceeding.

There is no dispute that Bonnie Weisgram died of smoke inhalation sometime before dawn on December 30, 1993. As stated above, petitioner contended that the fire was caused by a faulty heater manufactured by respondents, whereas respondents argued to the jury that Bonnie Weisgram caused the fire by dropping a cigarette in the couch in her living room. After a two week trial, the jury returned a verdict of $500,000 in favor of petitioner, necessarily rejecting respondents' cigarette theory of causation. The trial judge rejected all of respondents' motions for judgment as a matter of law and a new trial, and respondents appealed to the Eighth Circuit, which reversed because of erroneous admission of expert testimony. Not only did the Eighth Circuit panel majority set aside the judgment, but it directed the entry of judgment in favor of respondents based on its evaluation of the record as being insufficient to sustain a verdict for petitioner if there were a retrial. In doing so, the Eighth Circuit panel majority did not consider whether petitioner might be able to present additional evidence that had not been offered in the first trial. In addition, the Eighth Circuit panel majority did not consider whether the district court, which had heard all the evidence and had managed the case below, was in a better position to decide, as a matter of discretion, whether it was appropriate to order a new trial. Petitioner sought review of this Court on several issues, but review was limited to the question of the propriety of the order directing judgment in favor of the respondents.

In order to understand why the Eighth Circuit panel majority should have ordered a new trial, or at least allowed the trial judge to determine whether a new trial was warranted, it is necessary to review the trial record and to consider it in light of the factual contentions made by the parties and the requirements of North Dakota law. Because the issue before the Court is the propriety of the Eighth Circuit panel majority's decision, petitioner will set forth the evidence in much greater detail than would ordinarily be appropriate in this Court to demonstrate the unfairness of denying petitioner an opportunity to argue for a new trial before the district court. Although some of the factual presentation could be seen as arguing that the rulings excluding certain of petitioner's evidence were in error, those facts are all relevant to the issue of the cause of the fire and whether there was sufficient circumstantial evidence of a defect in respondents' heater to satisfy the requirements of North Dakota law.

A. THE CAUSE OF THE FIRE.

Captain Dan Freeman of the Fargo Fire Department was the first firefighter inside the Weisgram town home shortly after 6:00 a.m. on December 30, 1993. Freeman Tr., pps. 18-19. When Freeman arrived at the scene, he noticed fire burning on the south (left) side of the front door of the structure. *Id.* at 16-17. The fire was burning at the floor level and extended upward approximately 18 to 24 inches. *Id.* at 17, 19. Freeman doused the fire with water and entered the town home. *Id.* at 19. The exterior door was closed but the interior door was open approximately 45°. *Id.* at 18-19. Freeman did not see any other visible fire within the town home and never saw flaming combustion in the couch at any time. *Id.* at 21, 27.

Freeman then began a search and rescue operation. *Id.* at 21. He found Bonnie Weisgram in a bathroom on the upper

level of the home but she was already dead. *Id.* at 24, 88. Freeman and another firefighter, Roger Thorseth, carried Bonnie Weisgram's body outside. *Id.* at 24-25. After determining there were no other victims in the town home, Freeman began investigating the cause and origin of the fire. *Id.* at 25, 28.

Freeman immediately focused on the entryway and sectional couch located on the upper level of the town home as those areas contained the most fire damage. *Id.* at 30-31; Ex. 2-4, 6, 8, 9-10. Freeman examined the couch carefully to determine whether the fire started in that location. *Id.* at 31-32, 60-61. He started with the polyurethane couch cushions, but he did not see evidence of byproducts of flaming combustion. *Id.* at 31-32. He looked underneath the couch but did not see any deep charring on the floor which would indicate flaming combustion. *Id.* at 32, 60-61. He also looked above and behind the couch, and at the nearby piano, and saw no indication of significant fire damage in either place. *Id.* at 32, 55-56, 61-63, 176.

Freeman saw that the most severe damage on the upper level was located on the backside of the couch. *Id.* at 70, 75. The back of the couch was exposed to the entryway except where a wrought iron railing stood in the way. *Id.* at 59. Freeman also noted charring on the woodwork along the floor of the upper level and behind the couch. *Id.* at 70, 119-120; Ex. 224. In Freeman's mind, heat which was sufficient to char the wood trim board on the upper level was sufficient to ignite the cloth on the back of the couch. He also determined that the open interior door would not have prevented the fire from reaching the back of the couch. *Id.* at 69. Freeman considered the possibility that the fire started in the couch by a cigarette but rejected that possibility as there was "no evidence to back it up." *Id.* at 60-61.

Freeman then turned his attention to the entryway. He saw deep charring along the south wall where the heater was located. *Id.* at 32, 39-40; Ex. 2, 3, 4, 8. He also saw deep

charring on the east wall where the front door was located. *Id.*; Ex. 2, 3, 6, 8. These were the areas where Freeman saw fire when he arrived at the scene. *Id.* at 17-19, 21, 36-37. The fire patterns were consistent with a fire that ignited from a source in the southeast corner of the entryway where the heater was located. *Id.* at 74.

Freeman, continuing his investigation in the entryway, saw a hole approximately two feet long underneath the heater, strongly indicating that the fire burned most intensely and the longest at that location. *Id.* at 37, 43, 49-50, 72; Ex. 8. Freeman also noted significant damage to the ceiling above the entryway, directly over the hole in the floor. *Id.* at 45-46. Finally, Freeman saw heavy heat damage and discoloration on the bottom of the heater. *Id.* at 47-48; Ex. 5, 7.

Freeman asked another firefighter, Gerald Splitt, to take a sample of debris next to the hole to find out whether an accelerant was present. *Id.* at 50-51. Splitt took a sample of rug material and other debris at the edge of the hole in the entryway floor.[2] Vol. II, pps. 53-54. The state laboratory did not find any evidence of accelerants and arson was ruled out as a cause of the fire. Freeman Tr., pps. 51-52; Vol. II, p. 57.

The deposition of Merle Higgs, Bonnie Weisgram's fiancé, was read to the jury as he was not available for the trial. He testified that there was a "big throw rug" in the entryway where Bonnie Weisgram would place her shoes when using the front door. Higgs Depo., p. 17. The rug, which had a "shaggy" surface with a "looping" weave, would occasionally get pushed back -- toward the baseboard heater -- when the interior door was opened. *Id.* at 17 -18. The description of the rug, and what happened to it when the door was opened, were confirmed by the testimony of Bonnie

[2] Splitt is a Captain in the Fargo Fire Department. Vol. II, p. 50. He has been a firefighter for 31 years and a fire and arson investigator since 1980. *Id.* at 50-51. Splitt testified that it was obvious where the fire originated - in the area of the hole. *Id.* at 52-53, 63.

Weisgram's two sons, Chad and Ryan. Vol. IV, pps. 94-95, 97-98, 114.

Based upon his observations and the physical evidence at the fire scene, Freeman concluded that the fire started in the area of the heater. Freeman Tr., pps. 32-33. He believed that the throw rug in the entryway, a remnant of which was found adjacent to the hole in the floor, was pushed up against the heater. *Id.* at 64, 67. The throw rug "trapped" the heat and ignited the glue underneath the vinyl flooring directly under the heater. *Id.* at 64-67. The fire in the entryway eventually ignited the couch. *Id.* at 32-34, 73-75.

As a result of his investigation, which was conducted as part of his job and not as an expert employed by petitioner, Freeman eliminated the potential causes of the fire -- arson, accidental, cigarette ignition, and an electrical source (other than the heater).[3] Because Freeman believed that the heater was the likely cause of the fire, he sent the heater and photographs of the fire scene to Ralph Dolence, another experienced fire investigator who lived in Ohio, for further evaluation. *Id.* at 77-80.

Dolence, whose qualifications as a fire investigator were unchallenged at trial or by the Court of Appeals, received the Weisgram heater from the Fargo Fire Department in January of 1994, along with a set of photographs taken of the fire scene. Dolence Tr., pps. 24- 25. Thereafter, Dolence and Freeman talked about the fire scene for over an hour on the telephone in an effort to consider every possible source of the fire and narrow the focus of the investigation. *Id.* at 26-28. Dolence inspected the heater and discovered that it had sustained heavy heat damage and discoloration in the fire which he attributed to extreme heat. *Id.* at 36-37; Ex. 5, 7. This finding was consistent with the hole in the floor of the entryway directly underneath the heater. *Id.* at 38-39, 41.

[3] The District Court recognized Freeman as a qualified fire and origin expert.

Dolence found extensive heat damage inside the metal housing which served as the cover for the heater. *Id.* at 89.

Inside respondents' heater, aluminum fins dispense heat generated by the heating element. *Id.* at 163-64. The heating element is housed inside an aluminum tube and the fins are attached to the tube. *Id.* During his inspection, Dolence noted that approximately one-third of the aluminum fins on the heater survived the fire virtually unscathed. *Id.* at 54-55; Ex. 25. This evidence indicated that a portion of the heater was uncovered when the fire began and the heat from the fins was allowed to escape. *Id.* On the other hand, the melted aluminum fins clearly showed that the heat underneath the covered portion was not allowed to escape and, instead, was reflected back into the heater. *Id.*

After reviewing the fire scene photographs, examining the baseboard heater, and talking to Freeman, Dolence formed his opinions about the cause of the fire. *Id.* at 90. Those conclusions were virtually identical to Freeman's: the throw rug was pushed against the heater, igniting the glue underneath the vinyl floor. *Id.* at 50-52, 54, 105-06, 168-69, 190-91. Dolence believed that the fire began in the heater and eventually spread to the walls and ceiling in the entryway. *Id.* at 32-33, 62. As the flaming fire continued to spread, it attacked the back of the couch located on the upper level and caused smoldering combustion in the couch. *Id.* at 60-62, 65, 105-06, 174-76.

Sandy Lazarowicz, who was recognized as an expert in the properties of metal (in this instance, silver), became involved in this case at the request of Dolence as part of the investigation of the cause of the fire.[4] Lazarowicz Tr., pps.

[4] Both the regulating thermostat and high limit control contacts are made of silver. The former is used to increase or decrease the temperature by turning the dial. For purposes of this case, the regulating thermostat is essentially comprised of two silver contacts (the "moveable arm" contact and the "stationary" contact) and a "spring arm" which opens and closes the circuit. When the two contacts are together, electricity

18-19; Dolence Tr., p. 100. Dolence showed Lazarowicz the markings and serrations on the Weisgram regulating thermostat contact surface as Dolence suspected the contact had been tampered with.[5] Lazarowicz Tr., pps. 20, 23; Dolence Tr., p. 99. Lazarowicz advised Dolence that the serrations had been made during the manufacturing process. Lazarowicz Tr., pps. 23-24. He also told Dolence that there was evidence of electrical arcing and material transfer on the Weisgram contacts.[6] *Id.* at 32-34; Ex. 45, 53. Lazarowicz observed an arrowhead shaped "pullout" area on one contact (the moveable contact located on the spring arm) and a corresponding "deposit" on the other contact (the stationary contact). *Id.* at 33-34, 38; Ex. 45, 53. The arcing and material transfer on the Weisgram contacts did not represent the "normal operation" of a set of contacts. *Id.* at 55-56. Respondents' experts admitted that there was evidence of arcing and material transfer on the regulating thermostat contacts. Phy Tr., pps. 96, 119-124; Vol. VII, pps. 85-86, 122-23. According to Lazarowicz, approximately 25 percent of the silver on the moveable arm contact had been transferred to the stationary contact and this was clear evidence of welding. Lazarowicz Tr. pps. 32-34, 38; Ex. 45, 53.

Lazarowicz examined the Weisgram contacts and contacts taken from an exemplar heater taken from the adjacent town home (Ferguson heater) under stereoscopic and

flows through the heater and it produces heat. When the two contacts are separate, the heater does not carry electricity and cannot produce heat.

[5] Serrations, in this case, are defined as grooves which appear on the regulating thermostat's moveable arm contact. Although Dolence had seen "thousands" of contacts during his career as an electrician and electrical fire investigator, he had never seen serrations on a contact surface. Dolence Tr., p. 99.

[6] Arcing is defined as the electric current that is drawn between two contact surfaces, typically when the contacts separate. Lazarowicz Tr., p. 29. It has also been described as a "spark." Phy Tr., p. 121.

electron scanning microscopes. Based upon his examination of both sets of contacts, Lazarowicz concluded that the Weisgram thermostat contacts were closed, and the heater was "on," as the rug caught fire instead of shutting off at 190°F as it was supposed to do. *Id.* at 47-48. Lazarowicz pointed out numerous differences between the Weisgram and Ferguson contacts, as they were presented to him, in support of his conclusions. First, the Ferguson contacts showed much less arcing and material transfer as compared to the Weisgram contacts. *Id.* at 39-41; Ex. 85, 94.

Second, the contact surface around the arc pits on the Ferguson moveable arm contact was smooth and "glass like" but the Weisgram contact surface was irregular and very porous. *Id.* at 42-46; Ex. 88, 97. The difference in the contact surfaces was related to the temperature of the contacts when the arc strikes occurred, which shows that the Weisgram contacts opened at a much higher temperature. *Id.* at 43. In other words, the electrical arcing occurred when there was a very high external heat source - a fire - as compared to room temperature in the Ferguson contacts. *Id.* at 43-46. The Weisgram contacts separated after the temperature of the contact surfaces reached a point which allowed the metal to soften and "unweld." *Id.* at 47-51. Lazarowicz believed that the separation occurred when the contacts surface temperature reached approximately 850°F during the fire. *Id.* at 50-51. This was why the contacts were found separately after the fire. *Id.* at 73. In addition, the Weisgram contacts also had a flowing topography as compared to the Ferguson contacts' which had a jagged topography. *Id.* at 50-51. The physical evidence on the contact surfaces demonstrated that the Weisgram contacts were welded together at the time of the fire on December 30, 1993. *Id.* at 40, 112, 114. Ultimately, Lazarowicz concluded that the moveable arm contact in the regulating thermostat was defective because it contained serrations which promoted

electrical arcing and material transfer.[7] *Id.* at 30-31, 51-52, 93, 111-12.

Lazarowicz also believed the regulating thermostat contacts did not "mate" squarely but instead joined in the lower, left-hand quadrant on the moveable arm contact. *Id.* at 51-52. This pattern increased the possibility of welding and material build up in that area. *Id.* The surface incongruities on the Weisgram moveable arm contact built up over time and finally welded the contacts together. *Id.* at 32, 38, 40, 51-52. The welding of the Weisgram regulating thermostat contacts is the reason why they did not open before the fire started. *Id.* at 111-12.

Finally, the high limit control is designed to turn the heater off when it senses temperatures in excess of 190°F. Phy Tr., pps 46, 146. The high limit control contacts are always together unless there is an overheating situation. All of the experts agreed that the *high* limit control contacts did not show any of the telltale signs of ever having been activated. *Id.* at 83-84, 156; Vol. VI, pps. 51-52. The lack of electrical arcing on the high limit control contacts conclusively established that the control did not activate while the heater was operating even when the temperature in and around the heater reached, or exceeded, 190°F on the night of the fire. Lazarowicz Tr. pps. 48, 54. The high limit control did not work as designed in the Weisgram heater at the time of the fire as it did not activate and turn the heater off before the rug caught on fire. *Id.* at 53-54.

B. THE DEFECTS IN THE WEISGRAM HEATER.

The heater is a piece of equipment that is located on the floor, so it is likely that items (such as throw rugs) would

[7] Richard Moore, a representative of the successor company who manufactured the contacts in the regulating thermostat, testified that he has examined as many as 1,000 contacts made by other companies during his career and none of them had serrations. Vol. VII, pps. 92, 101-02.

come in contact with it when it was on. Those items could catch fire, potentially causing fires like this one, unless the heater shuts down when temperatures reach dangerous levels. In this case, the Weisgram heater failed to shut off when it reached high temperatures (i.e. temperatures which would ignite nearby combustibles).

The petitioner maintained at trial that the Weisgram heater contained several serious design defects which were noticed after the fire and which combined to cause the fatal fire. One design defect was in a safety feature: the placement of the high limit control capillary tube within the heater enclosure behind a deflector shield and too far away from the heat element (so that it would not shut off until it was too late). There were two defects involving the regulating thermostat; first, the moveable arm contact in the regulating thermostat contained unusual serrations from the manufacturing process which limited the contact area for electricity; and second, the contacts themselves "mated" only partially, or in one quadrant of their contact area. These design defects promoted arcing and material transfer.

As allowed by North Dakota law, petitioner proceeded to prove the defects by both circumstantial evidence and expert opinion. However, the Eighth Circuit panel majority concluded that the petitioner's expert opinions were "unreliable" because there was not any testing accomplished to support their theories. In so doing, the Eighth Circuit panel majority neglected to record that certain testing and observation of the parts was accomplished (by both parties), and neglected to appreciate that no one was able to perform many definitive tests because certain pieces of key evidence were destroyed by the fire. Phy. Tr., pps. 116-118; Vol. VII, pps. 81-82. The Weisgram heater was in pieces when it was recovered by the Fargo Fire Department. Dolence Tr., pps. 81-82, 88-89, 93-94, 203-04. The regulating thermostat was broken into multiple pieces and the high limit control had been mutilated in the fire. *Id.* at 142. With respect to the high

limit control, the diaphragm inside the bellows cup was missing. *Id.* at 93-94. The bellows cup was not attached to the capillary tube. *Id.* at 94. The pin that activates the diaphragm was missing. *Id.*

As a result of the fire damage, all parties conceded it was impossible to test each component part of the Weisgram heater completely. Phy Tr., pps. 116-18; Vol. VII, pps. 81-82. Respondents' experts conceded at trial that testing of the subject high limit control, for instance, could not prove that it worked before the fire started. Phy Tr., pps. 83-84, 156; Vol. VI, pps. 51-52. Examination of certain component parts, however, was undertaken, and significant observations were made. The high limit control did not appear to have ever activated before the fire. *Id.*

In addition, there was no way to use similar component parts to replicate the Weisgram heater which was manufactured in approximately 1977. Unimax, the company which manufactured the regulating thermostat switch that petitioner contended was defective, produced approximately 10,000 switches per day. Vol. VII, p. 114. Each switch was manually adjusted by an employee of Unimax and each one is different. *Id.* at 114-15, 121.

The tests conducted on the Ferguson heater by respondent did nothing to dispel the notion that the Weisgram heater was defective because it operated at temperatures that were far too high. In one test where the Ferguson heater was allowed to run with the regulating thermostat and high limit control in place (i.e., normal operation), the air temperature in front of the heater reached 403°F before it turned off. Ogle Tr., p. 109. In that same test, the aluminum fin tube registered a temperature of 625°F. *Id.* at 109-10. In a second test where the Ferguson heater was allowed to operate with the high limit control in place, the air temperature in front of the heater reached 417°F before it turned off. *Id.* at 110-11. In a third test where two-thirds of the Ferguson heater was blocked, the air temperature in front of the heater reached

413°F before the heater turned off. *Id.* at 112. Finally, in a test where the regulating thermostat and high limit control were removed, the air temperature in front of the heater reached 575°F and the aluminum fin tube housing the heating element exceeded 700°F.[8] *Id.* at 115-16. That temperature reading was approximately 300°F higher than the ignition temperature of a petroleum based adhesive, and approximately 250°F higher than the ignition temperature for a cellulose based rug, similar to the rug in the Weisgram home. Dolence Tr., pps. 194-95. Freeman Tr., pps. 64-65. Moreover, besides an inability to test the Weisgram heater, none of the experts were able to reconstruct or re-create the Weisgram home in order to perform any testing after the fire. Ogle, Tr., pps. 69, 103.

C. CARELESS CIGARETTE THEORY.

Although respondent did not agree with the theory of a defective heater, its principal defense at trial was that there was a different explanation for the cause of the fire, dubbed the "careless cigarette" theory. Briefly, Ogle, respondents' cause and origin expert, opined that someone dropped a cigarette between one of the cushions and the back of the couch on the evening of December 29, 1993, and a smoldering fire started. Ogle Tr., p. 46. Ogle then claimed that Bonnie Weisgram was alerted to the smoldering fire, so she took the middle cushion to the entryway. *Id.* at 36-37, 43. He claimed Weisgram, instead of throwing the cushion outside, placed the middle cushion behind the interior door and in front of the baseboard heater. *Id.* at 43-44. Ogle admitted, however, that there was no evidence of a couch cushion or charred polyurethane foam in the entryway after the fire. *Id.* at 139-40, 146. In addition, the theory was based

[8] The references to "70" degrees in the trial transcript are incorrect; the transcript should read "700" degrees

on the assumption that the middle cushion was no longer on the couch after the fire. *Id.* at 136-37, 141-46.

Ogle's theory was directly refuted by eyewitnesses at the fire scene. Freeman testified that there was no evidence of a polyurethane couch cushion in the entryway after the fire. Freeman Tr., p. 79. He did not see any charring from polyurethane foam or a zipper sewn into the couch cushions. *Id.* at 76-77, 79. Freeman also looked into the hole in the entryway and did not see any part of a polyurethane cushion. Vol. VII, p. 139-40, 149. According to Freeman, "there was no way that cushion was in that hole, any part of it. It wasn't there." *Id.* at 140. Freeman also testified that the middle cushion was still located on the couch when he investigated the fire on December 30, 1993. Freeman Tr., pps. 75-76; Vol. VII, pps. 142-44, 148-49. He saw the middle cushion on the couch after the fire "with his own two eyes." *Id.* at 148-49.

Likewise, Gerald Splitt did not see any evidence of polyurethane foam in the entryway when he took the sample next to the hole in the floor. Vol. II, p.56. He believes he would have noticed the remnants of polyurethane foam if it had been in the entryway. *Id.* at 56-57. Finally, Chad Weisgram testified that he cleaned out the closet area underneath the hole and did not see any evidence of a couch cushion. Vol. VII, pps. 151-52. The jury obviously rejected this theory regarding the cause of the fire.

PROCEDURAL HISTORY

Chad Weisgram, individually and on behalf of Bonnie Weisgram's heirs, commenced a lawsuit against Marley Company for the wrongful death of his mother. State Farm, which insured the Weisgram home, sued Marley to recover insurance benefits paid for the damage to the Weisgram town house and its contents, and (by assignment) benefits paid for the damage to the adjoining town house. The cases were consolidated and tried to a jury on the theory that Marley was

strictly liable because the baseboard heater was defective. The jury awarded $500,000 to Chad Weisgram and the heirs of Bonnie Weisgram and $100,575.42 to State Farm. Marley's post-trial motions for judgment as a matter of law and motion for a new trial followed and were opposed by the Plaintiffs.

On September 4, 1997, Chief Judge Rodney Webb for the United States District Court for the District of North Dakota issued a Memorandum and Order denying respondents' post-trial motions. In his Memorandum and Order, Chief Judge Webb found no reason to exclude the testimony of petitioners' experts and determined that adequate support existed to mark the testimony as reliable. Respondents subsequently appealed. On February 23, 1999, in a two to one decision (Judge Bright, dissenting), the Eighth Circuit panel majority vacated the judgment for petitioners after excising portions of petitioners' experts' testimony and remanded the case to the district court with instructions to grant respondents judgment as a matter of law. Judge Bright in his dissent stated:

> The majority errs in a second regard. See Maj Op. at 4 n 2. If the district court erred in admitting the testimony of the plaintiffs' experts, the relief to be awarded is a new trial, not judgment as a matter of law. In *Midcontinent Broadcasting Co., v. North Central Airlines, Inc.*, 471 F.2d 357 (8th Cir.1973), this court held a new trial is the proper remedy for an error in the admission of expert testimony. *See App. to Pet. for Writ of Cert.*, p. A-26

Further Judge Bright stated:

> This controversy represents a typical case to be decided by a jury. This court ought not overturn

> both the trial judge and the jury. *See App. to Pet. for Writ of Cert.*, pps. A-26 and A-27.

Rehearing and Rehearing En Banc were denied by the United States Court of Appeals for the Eighth Circuit on April 26, 1999. Joint App., p. 169.

Chapter 28 U.S.C. § 1332 conferred jurisdiction on the district court in the first instance. Chapter 28 U.S.C. § 1291 conferred jurisdiction on the United States Court of Appeals for the Eighth Circuit.

SUMMARY OF ARGUMENT

After concluding that the admission of certain expert testimony was erroneous and that it prejudiced respondents, the Eighth Circuit panel majority committed a series of errors in disposing of this case by directing the entry of judgment for respondents.

First, the decision on whether to permit a new trial is a decision that is committed to the discretion of the district court under Rule 59(a)(1) of the Federal Rules of Civil Procedure. As a discretionary ruling, like the decision to admit the expert testimony in the first place, it should be exercised by the trial judge who saw the witnesses and presided over the entire proceeding, not by the Court of Appeals which sees only a cold record and has much less of a sense of whether the interests of justice require a new trial. Nor is a trial judge likely to order a new trial unless there is a legitimate basis for doing so since he or she will have to preside over it and thus will not be inclined to grant a new trial unless there is indeed legitimate basis. Allowing the Court of Appeals to make such determinations also raises Seventh Amendment issues under *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996).

Second, as most of the other Courts of Appeal have recognized (and indeed as the Eighth Circuit held in a prior

case), it is improper to direct a verdict against the party whose favorable evidence has been excluded. The reason for that rule is that the party whose evidence has been excluded after trial may well have been able to supply alternative evidence (as was the case here), but did not do so when the primary evidence was admitted. If the rule applied by the Court of Appeals were followed, parties would have to "over-try" their cases, by offering redundant evidence (expert and otherwise) out of a concern that an appellate court might exclude some piece of evidence and then decide what is left was not sufficient to warrant a new trial.

Third, as the record in this case demonstrates, and as the district court surely would have concluded, there is ample evidence to justify a new trial. There can be no issue about the quantity and quality of the evidence on the primary issue at trial: whether the fire was caused by the heater not shutting off when the rug was pushed against it (as petitioner contended) or whether a cigarette started the fire (as respondents urged and the jury plainly rejected). Thus, the only real question on which there could be any doubt of there being sufficient evidence to go to the jury is on whether respondents' heater was defective.

On the issue of defect, North Dakota law -- which the Eighth Circuit panel majority seems to have overlooked -- is quite clear that defects in cases like this case can be established by circumstantial evidence because of the problem of reconstruction of equipment destroyed in a fire. Here, relying on objective facts not in dispute, as well as respondents' own witnesses, petitioner was able to establish, even without the excluded expert testimony, that the heater was both defectively designed and manufactured because it did not shut off at 190°F, as it was supposed to do. If it had shut off there would have been no fire. In reaching the opposite conclusion, the Court of Appeals assumed a role that should have been undertaken by the district court, and its assertions that this was "not a close case" can only have been

based on its lack of familiarity with the record, and its failure to understand the theories of defect put forward by petitioner and accepted by the trial judge when he denied respondents' post-trial motions.

Petitioner does not ask this Court to review the record and reach its own conclusion about whether petitioner met the burden on showing a defect under North Dakota law. Rather, this evidence is offered to show why the Court of Appeals erred in undertaking an independent review of the record of this two week trial and deciding that there was "no reason to give plaintiffs a second chance" to prove their case, instead of remanding to the district court for that determination, which, as in *Gasperini*, would be subject to appellate review under an abuse of discretion standard.

ARGUMENT

The Eighth Circuit panel majority first excised certain expert testimony admitted at trial as erroneous. It then ordered JAML be entered for respondents without considering argument as to why a new trial would be warranted for petitioner.

I. WHEN AN APPELLATE COURT EXCISES EXPERT TESTIMONY AS ERRONEOUSLY ADMITTED, THE DECISION WHETHER TO PERMIT THE PARTY WHO PREVAILED BELOW A NEW TRIAL SHOULD BE COMMITTED TO THE DISCRETION OF THE DISTRICT COURT.

The act of first excising expert testimony, and then ordering JAML produces a harsh and final result without an opportunity to be heard on whether a new trial is appropriate. The trial court, who personally presided over the pretrial and trial proceedings, and presumably would preside over a new

trial if warranted, is in the best position to decide if a new trial is indeed warranted.

The interests of justice would at least afford petitioner an opportunity to be heard. Therefore, at a minimum, the rule should be: when an appellate court finds the district court erred in admitting expert testimony, and the error is sufficient to overturn a verdict, the party who prevailed below, but lost on appeal, should be allowed to show the district court why a new trial, without the excised testimony, is justified, before judgment is summarily entered against him. As this Court aptly stated in *Gasperini*, 518 U.S. 415 at 438:

> Trial judges have the unique opportunity to consider the evidence in the living courtroom context' (citation omitted), while appellate judges see only the 'cold paper record' (citation omitted).

The issue here is: can petitioner ever, under any circumstances, present enough admissible evidence to create a jury issue under North Dakota law? "Appellate courts are awkwardly equipped to resolve such issues, particularly in the absence of adversary argument, (whereas) the trial judge has an extensive and intimate knowledge of the evidence and issues in a perspective peculiarly available to him alone." *United States v. Generes, et Vir.*, 405 U.S. 93, 112 (1972) (White, J., concurring) (citation omitted).

The decision as to whether to permit a new trial is a decision that is committed to the discretion of the district court under Rule 59(a)(1) of the Federal Rules of Civil Procedure. The trial judge is not likely to order a new trial unless there is a proper basis for doing so since he or she will have to preside over it. As a discretionary ruling, like the decision to admit the expert testimony in the first place, the ruling would be subject to review for abuse of discretion.

Allowing a Court of Appeals to determine that a new trial is not warranted, based upon its review of a cold, and perhaps

incomplete record also raises Seventh Amendment issues. Here, the Eighth Circuit panel majority excised testimony prior to reviewing the district court's denial of respondents' motion for JAML. Appellate review of this sort fails to attend to "an essential characteristic of [the federal-court] system." *Gasperini,* 518 U.S. at 431, (quoting *Byrd v. Blue Ridge Rural Elec. Coop., Inc.,* 356 U.S. 525, 537 (1958)). In finding that the Weisgram heater caused the fire, the jury obviously rejected any alternate cause theory advanced by the respondents. Disputed questions of fact properly remain the province of the jury. As counseled by this Court:

> The federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction. An essential characteristic of that system is the manner in which, in civil common-law actions, it distributes trial functions between judge and jury, and, under the influence -- if not the command -- of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury.

Gasperini, 518 U.S. at 432 (quoting *Byrd,* 356 U.S. at 537).

The Eighth Circuit panel majority, in this case, impermissibly judged the factual merits of the case. Appellate reexamination of this sort is forbidden by the Seventh Amendment to the United States Constitution, which states:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

U. S. CONST., amend. VII.

Without directly referring to the Seventh Amendment issue, this Court has previously addressed a situation where the appellate court determined that there was insufficient evidence to sustain a finding of negligence and ordered judgment for the respondent. In a per curiam decision, reversing the appellate court, this Court stated:

> Under these circumstances, we think the Court of Appeals erred in directing entry of judgment for respondent; the case should have been remanded to the Trial Judge, who was in the best position to pass upon the question of a new trial in light of the evidence, his charge to the jury and the jury's verdict and interrogatory answers. *Fed. Rule Civ. Proc.*, 50(d) *See*, *Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317, 87 S.Ct. 1072, 18 L.Ed. 2d 75; *Weade v. Dichmann, Wright & Pugh, Inc.*, 337 U.S. 801, 69 S.Ct. 1326, 93 L. Ed. 1704.

Iacurci v. Lummus Company, 387 U.S. 86, 88 (1967).

JAML deprives a nonmoving party of a determination of the facts by a jury. It should be granted cautiously and sparingly applied so as not to infringe on rights preserved by the Seventh Amendment. The Eighth Circuit panel majority failed to adhere to this stringent standard of review. If the Eighth Circuit panel majority's decision is affirmed, petitioner will be unfairly denied a jury trial. Petitioner should be afforded an opportunity to argue there is substantial evidence remaining which would support a verdict. The district court is in the best position to hear the argument and make the new trial decision. Therefore, at a minimum this case should be remanded to the district court for proceedings on the new trial issue.

II. THE EIGHTH CIRCUIT PANEL MAJORITY'S DECISION TO GRANT JUDGMENT AS A MATTER OF LAW TO RESPONDENT MARLEY COMPANY, ONLY AFTER EXCISING PORTIONS OF PETITIONER'S EXPERT TESTIMONY, WAS IMPROPER.

The Eighth Circuit panel majority's directive to grant respondents JAML only after excising portions of the expert testimony presented by petitioner, and admitted at trial, was error. Assuming, as we must, that the district court abused its discretion in admitting certain expert testimony during trial, the relief to be granted should be a new trial, not JAML.

Several circuits, including the Eighth Circuit, have held that a trial court in deciding a motion for JAML (and its predecessor JNOV) may not exclude from its decision making process evidence deemed erroneously admitted at trial. The logic of these decisions applies with equal, if not more, force to the cold record appellate review of a trial court's denial of a motion for JAML. An appellate court must employ the same standards as the trial court in reviewing a trial court's denial of a Fed. R. Civ. P. 50(b) motion. Therefore, it too must base its decision on the ***entire*** trial record and cannot take into account the fact that part of the evidence may have been improperly admitted.

A. THE RULE IN THE EIGHTH CIRCUIT CLEARLY IS: IF THE DISTRICT COURT ERRED IN ADMITTING THE TESTIMONY OF THE PETITIONER'S EXPERTS, THE RELIEF TO BE AWARDED IS A NEW TRIAL, NOT JAML.

In *Midcontinent Broadcasting Co. v. North Central Airlines, Inc.*, 471 F.2d 357, 358 (8th Cir. 1973), the United States Court of Appeals for the Eighth Circuit determined that "in ruling on the sufficiency of evidence, the trial court must

take the record as presented to the jury and cannot enter judgment on a record altered by the elimination of incompetent evidence." *Id.* The Eighth Circuit reasoned that such action was inappropriate in connection with a motion for judgment n.o.v., but would be proper in granting a motion for a new trial. *Id.* at 358-359 (citing *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 249 (1940)). The rationale stated by the Eighth Circuit in *Midcontinent* is very applicable in this case:

> The subsequent ruling, after the verdict, that the expert opinion was not admissible after it had been originally received and considered by the jury, placed plaintiff in a relative position of unfair reliance. If plaintiff had been forewarned during the trial that such testimony was not admissible it conceivably could have supplied further foundation or even totally different evidence. Under these circumstances the grant of the judgment n.o.v. was not a proper remedy.

Midcontinent, 471 F.2d at 359.

Because the trial court used improper standards in granting JNOV, the Eighth Circuit ordered that the judgment be set aside and that the case be remanded for a new trial. *Id.* at 360.

Inexplicably, the Eighth Circuit panel majority in the case presently before this Court ignored the precedence of its *Midcontinent* decision. Instead, the Eighth Circuit panel majority, in footnote 2 of its opinion, comments that "it can discern no reason to give the plaintiffs a second chance to make out a case of strict liability" and cites two cases where the new trial issue was not before the appellate court. *See App. to Pet. for Writ of Cert.*, pps. A-5 and A-6. Yet, petitioner here did have other experts who were not called. In addition, North Dakota law permits a jury to find product

defect based upon circumstantial evidence alone. Petitioner rested his case only after his experts, whether rightfully or erroneously, had already testified. The Eighth Circuit panel majority ruled on the cold record of the case as tried. If the excised opinions had not been admitted at trial, the case would have been tried differently. Petitioner should have the opportunity to present admissible evidence and have a North Dakota jury decide his case. At a very minimum, the trial court, who is in a better position, having presided over all of the proceedings, should hear argument and decide whether a new trial is warranted.

If the Eighth Circuit panel majority's decision is affirmed, parties will be forced to "over try" their cases because of concern that the trial court's admissions of expert testimony will be reversed on appeal. Parties will be forced to present more than one expert on each issue because the appellate court might "second guess" the expert's qualifications or opinions. A rule requiring remand for new trial determination when expert testimony is excluded will assure parties that extraordinary, duplicative, or unnecessary expert testimony will not be needed to overcome these concerns.

B. OTHER CIRCUITS HAVE FOLLOWED THE REASONING OF *MIDCONTINENT* AND HELD THAT A COURT MAY NOT, AFTER A TRIAL IS OVER, FIRST EXCLUDE EVIDENCE AND TESTIMONY AND THEN GRANT A MOTION FOR JAML.

In *Jackson v. Pleasant Grove Health Care Center*, 980 F.2d 692, 695-96 (11th Cir. 1993), the United States Court of Appeals for the Eleventh Circuit so held. In reaching its decision, the Eleventh Circuit reasoned:

> The rationale for prohibiting the district court from disregarding previously admitted evidence is

> reliance. If evidence is ruled inadmissible during the course of the trial, the plaintiff has the opportunity to introduce new evidence. However, when that evidence is ruled inadmissible in the context of deciding a motion for JNOV, the plaintiff, having relied on the evidence already introduced, is unable to remedy the situation.

Id. (citing *Midcontinent*, 471 F.2d at 358-59).

In a 1998 per curiam opinion, the United States Court of Appeals for the Ninth Circuit determined that the district court, in deciding a motion for JAML, following a remand from an appellate decision requiring the exclusion of evidence, may not exclude from its decision the evidence erroneously admitted at trial. *See*, *Elbert v. Howmedica, Inc.*, 143 F.3d 1208 (9th Cir. 1998) (per curiam).

In reaching its decision, the Ninth Circuit quoted at length from its decision in *Schudel v. General Elec. Co.*, 120 F.3d 991, 995 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 1560 (1998), which held that a trial court may not exclude evidence erroneously admitted at trial when deciding a motion for JAML pursuant to Fed. R. Civ. P. 50(b) following trial. In *Schudel* the Ninth Circuit wrote:

> We now hold that when ruling on a Rule 50(b) motion, a district court should not exclude evidence erroneously admitted at trial. The record should be taken as it existed when the trial was closed. This rule promotes certainty: litigants need not supplement conditionally admitted evidence, perhaps, unnecessarily; and district courts need not speculate as to what other evidence might have been offered if the evidence had been excluded at trial. The rule promotes fairness: punishing a litigant for the court's erroneous admission of evidence is unfair;

> and the remedy of a new trial is available to put both sides on an equal footing. (citation omitted).

Schudel, 120 F.3d at 995 (citing *Jackson v. Pleasant Grove Health Care Ctr.*, 980 F.2d 692, 695-96 (11th Cir. 1993); *Douglass v. Eaton Corp.*, 956 F.2d 1339, 1343-44 (6th Cir. 1992); *Sumitomo Bank of California v. Product Promotions, Inc.*, , 717 F.2d 215, 218 (5th Cir. 1983); *Midcontinent*, 471 F.2d at 38-59); *see also*, *Elbert*, 143 F.3d at 1209.

The Fifth Circuit has also held that a motion for JAML must be based on the entire trial record including evidence and testimony later deemed inadmissible. *See*, *Sumitomo Bank*, 717 F.2d at 218; *Dixon v. International Harvester Co.*, 754 F.2d 573, 580 (5th Cir. 1985).

Following the decisions of the Eighth and Fifth Circuits, the Sixth Circuit also determined that it is wholly improper for a court to ignore evidence admitted at trial from its consideration in granting a judgment notwithstanding the verdict. *Douglass*, 956 F.2d at 1344. (citing *Midcontinent*, 471 F.2d at 358; *Sumitomo Bank*, 717 F.2d at 218). Because the Sixth Circuit deemed such action impermissible, it reversed the district court's grant of judgment notwithstanding the verdict. *Id.* Without overruling *Douglass*, a Sixth Circuit panel in the recent case of *Smelser v. Norfolk Southern Railway Co.*, 105 F.3d 299 (6th Cir. 1997) did as the Eighth Circuit panel majority did in this case. First it excised expert testimony under Rule 702 of the Federal Rules of Evidence and then it ordered JAML under Rule 50 of the Federal Rules of Civil Procedure. Like the case presented before this Court, this was error. *Id.* at 306 A new trial is the proper remedy for an error in the admission of expert testimony.

III. FUNDAMENTAL NOTIONS OF FAIRNESS REQUIRE THAT PETITIONER BE AT LEAST GIVEN AN OPPORTUNITY TO ARGUE THAT A NEW TRIAL IS WARRANTED.

The record in this case demonstrates that there is ample evidence to justify a new trial. As more fully stated in the Statement of the Case, petitioner presented proof of product defect by both circumstantial evidence and expert opinion. In accordance with North Dakota law, the jury was instructed that "a product defect can be shown by circumstantial evidence." Jury Instruction No. 9. Joint Appendix, A-93; *See, Herman v. Gen. Irrigation Co.*, 247 N.W.2d 472 (N.D. 1976); *Schmidt v. Plains Elec., Inc.*, 281 N.W.2d 794 (N.D. 1979). Although the Eighth Circuit panel majority concluded that the petitioner's expert opinions were unreliable because there was no testing to support their theories, there is ample evidence in the record which would support a jury's finding that the heater was the cause and origin of the fire. The Eighth Circuit panel majority at no time questioned the qualifications of Petitioner's cause and origin fire investigators, Captain Dan Freeman and Ralph Dolence. Both of these experts personally inspected the evidence from the fire scene using accepted investigative techniques. As pointed out by Judge Bright in his dissent:

> "Fire cases differ from most accident cases because fires tend to destroy evidence of causation. As a result, theories about the cause of fires inevitably rest on circumstantial evidence. Arson and insurance cases, as well as product liability cases like this one, require expert evaluations to determine the cause of fire. The Courts traditionally permit qualified fire investigators to express opinions on the cause of fires."

App. Jt. Pet. for Writ of Cert. Pg. A-18.

In addition, petitioner had listed as a part of his case two other expert witnesses, John Gorman and Howard H. DeMatties. Joint Appendix A-71 and A-14 Docket Entry 64. If the trial court had excluded testimony of any of the experts, then petitioner would still have had the option to call Mr. Gorman and/or Mr. DeMatties to testify. That option is obviously not available because of the Eighth Circuit panel majority's ruling. The danger of an appellate court deciding in situations like this whether it is appropriate to have a new trial was made clear by this Court when it stated:

> "Part of the Court's concern has been to protect the rights of the party whose jury verdict has been set aside on appeal and who may have valid grounds for a new trial, some or all of which should be passed upon by the district court, rather than the court of appeals, because of, the trial judge's first-hand knowledge of witnesses, testimony, and issues -- because of his "feel" for the overall case. These are very valid concerns to which the court of appeals should be constantly alert."

Neely v. Martin K. Eby Construction Co., 386 U.S. 317, 325 (1967).

In this case, the Eighth Circuit panel majority decided it was "not a close case" based upon its review of the cold record, without providing petitioner an opportunity to be heard. It then ordered judgment from which, as a practical matter, there is no appeal. If this was not a close case, why was it necessary to excise expert testimony before granting JAML? Given the opportunity, petitioner would remind the appropriate court that a fire case, out of necessity, must involve circumstantial evidence. Petitioner was able to establish, even with the expert testimony excluded, that the heater was both defectively designed and manufactured because it did not shut off at 190°F as it was supposed to do.

If it had shut off, there would have been no fire. North Dakota law clearly permits a jury to find product defect based upon this circumstantial evidence alone, without expert testimony. There is ample circumstantial evidence available to support a verdict here. Petitioner tried this case as a circumstantial evidence case with supporting expert testimony. Respondents themselves elicited some of the erroneous expert testimony in cross examination. Dolence Tr., pps. 126-130, 137-39, 143, 187, 208. Additional foundation can be laid for the erroneous opinions petitioner offered on the experts who were called. Petitioner had two additional experts who could have been called before he rested.

But for this Court granting certiorari, the Eighth Circuit panel majority holding would have prevented petitioner from ever articulating these reasons for a new trial, anywhere, to anyone, under any circumstances. Fundamental notions of fairness do not allow such a result.

CONCLUSION

For all of the foregoing reasons, the judgment of the United States Court of Appeals for the Eighth Circuit as to petitioner should be vacated and the cause remanded to the district court for a new trial, or at a minimum, for proceedings to determine whether a new trial is warranted.

Respectfully submitted,

Paul A. Strandness
Counsel of Record
Stephen S. Eckman
ECKMAN, STRANDNESS & EGAN
200 East Lake Street
Wayzata, MN 55391
(612) 594-3600

Daniel J. Dunn
MARING WILLIAMS LAW OFFICE
1220 Main Avenue, Suite 105
P.O Box 2103
Fargo, ND 58107-2103
(701) 237-5297

Attorneys for Petitioner

APPENDIX

Rule 50. Judgment as a Matter of Law in Jury Trials; Alternative Motion for New Trial; Conditional Rulings

(a) Judgment as a Matter of Law.

(1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

(2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

(b) Renewing Motion for Judgment After Trial; Alternative Motion for New Trial. If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment- and may alternatively request a new trial or join a motion for a new trial under Rule 59. In ruling on a renewed motion, the court may:

(1) if a verdict was returned:

(A) allow the judgment to stand,

(B) order a new trial, or

(C) direct entry of judgment as a matter of law;

or

(2) if no verdict was returned;

(A) order a new trial, or

(B) direct entry of judgment as a matter of law.

(c) Granting Renewed Motion for Judgment as a Matter of Law; Conditional Rulings; New Trial Motion

(1) If the renewed motion for judgment as a matter of law is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) Any motion for a new trial under Rule 59 by a party against whom judgment as a matter of law is rendered shall be filed no later than 10 days after entry of the judgment.

(d) Same: Denial of Motion for Judgment as a Matter of Law. If the motion for judgment as a matter of law is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling the party to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

(As amended Jan. 21, 1963, eff. July 1, 1963; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 27, 1995, eff. Dec. 1, 1995.)